Supreme Court, U.S.
FILED
FEB 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1008 (2)

In The
Supreme Court of the United States
October Term, 1986

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

ALIAKBAR FAZELIHOKMABAD,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a decision by the Board of Immigration Appeals (BIA) denying an alien's motion to reopen deportation proceedings must be affirmed it is plausible and not arbitrary without regard to factors or evidence not considered by the BIA.

2. Whether the BIA, in ruling on a motion to reopen deportation proceedings, is required to address specifically the points raised by the alien or to articulate all factors bearing on its decision.

TABLE OF CONTENTS

	Pages
Questions Presented	i
Statement	1
Summary of Argument, Reasons for Denying Certiorari	5
Argument	
I. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE PROPER STANDARD OF REVIEW TO BE APPLIED IN REVIEWING DISCRETIONARY DETERMINATIONS BY THE BIA. NOR DOES THE STANDARD USED BY THE NINTH CIRCUIT IN THIS CASE CONFLICT WITH SUPREME COURT PRECEDENT.	6
II. THIS CASE IS NOT A PROPER VEHICLE TO RAISE THE ISSUES PRESENTED BECAUSE OF INTERVENING LEGISLATIVE DEVELOPMENTS.	13
III. THIS CASE IS NOT YET RIPE FOR REVIEW NOR IS IT A PROPER VEHICLE TO RAISE THE QUESTIONS PRESENTED BECAUSE OF THE FACTUAL DISPUTES LEFT UNRESOLVED.	17
Conclusion	18

TABLE OF AUTHORITIES

Pages

CASES:

Achacoso-Sanchez v. INS, 779 F.2d 1260 (7th Cir. 1985) 11

Ahwazi v. INS, 751 F.2d 1120 (9th Cir. 1981) 13

Aviles-Torres v. INS, 790 F.2d 1433 (9th Cir. 1986) 13

Balani v. INS, 669 F.2d 1157 (6th Cir. 1982) 7, 10

Brotherhood of Locomotive Fireman & Enginemen et al. v. Bangor & Aroostoor Reilroad Co., et al., 389 U.S. 327 (1967) 17

Citizens to Preserve Overton Park, Inc. et. al. v. Volpe, Secretary of Transportation, 401 U.S. 402 (1970) 7

Carrete-Michel v. INS, 749 F.2d 490 (8th Cir. 1984) 9

Dallo v. INS, 765 F.2d 581 (6th Cir.1986) 11

De La Luz v. INS, 713 F.2d 545 (9th Cir.1983) 8

Gonzalez-Batoon v. INS, 791 F.2d 681 (9th Cir. 1986) 8, 13

Haftlang v. INS, 790 F.2d 140 (D.C. Cir.1986) 9

Wong Wing Hang v. INS, 360 F.2d 715 (2nd Cir.1966) 7, 10, 11

INS v. Phinpathya, 464 U.S. 183 (1984) 7

INS v. Rios-Pineda, 471 U.S. 444 (1985) 6, 10, 12, 13

INS v. Jong Ha Wang, 450 U.S. 139 (1981) 12, 13

LeBlanc v. INS, 715 F.2d 685 (1st Cir.1983) 10

Luciano-Vincente v. INS, 786 F.2d 706 (5th Cir.1986) 10

TABLE OF AUTHORITIES—Continued

Pages

Luna v. INS, 709 F.2d 126 (1st Cir.1983) 10

Mattis v. INS, 774 F.2d 965 (9th Cir.1985) 8

Motamedi v. INS, 713 F.2d 575 (10th Cir.1983) 9

NLRB v. Guernsey-Muskingum Electric Co-op Inc., 285 F.2d 8 (6th Cir.1960) 17

Osuchukwu v. INS, 744 F.2d 1136 (5th Cir.1984) ... 10

Prapavat v. INS, 662 F.2d 561 (9th Cir.1981) 8, 9

Ramos v. INS, 695 F.2d 181 (5th Cir.1983) 10

Ravancho v. INS, 658 F.2d 169 (3rd Cir.1981) 9

Reyes v. INS, 673 F.2d 1087 (9th Cir.1982) 8, 9

Sang Seup Shin v. INS, 750 F.2d 122 (D.C. Cir.1984) 7, 9, 16

Sangabi v. INS, 763 F.2d 374 (9th Cir.1985) 13

Santana-Figueroa v. INS, 644 F.2d 1354 (9th Cir.1981) 9

Williams v. INS, 773 F.2d 8 (1st Cir.1985) 7, 10

Yahkpua v. INS, 770 F.2d 1317 (5th Cir.1986) .. 10

Zamora-Garcia v. INS, 737 F.2d 488 (5th Cir. 1984) 9

STATUTES AND REGULATIONS:

Administrative Procedure Act,

5 U.S.C. 706 7

Immigration and Nationality Act,

8 U.S.C. 1182 14

8 U.S.C. 1254 ..... 3, 12

8 U.S.C. 1255 ..... 3, 16

TABLE OF AUTHORITIES—Continued

Pages

Immigration Reform and Control Act of 1986, Pub. L. No. 99-603,

8 U.S.C. 1255a 14

8 U.S.C. 1255a(a)(1) 14

8 U.S.C. 1255a(a)(4) 14

8 U.S.C. 1255a(e) 14

Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639

Section 5 16

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Petitioner,

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ALIAKBAR FAZELIHOKMABAD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT

Respondent is a native and citizen of Iran who last came to the United States as a student on January 26, 1977. He remained in status as a student until 1979 when he filed a late application for an extension of stay. He was ordered

deported on May 22, 1980 as an overstay. He appealed to the Board of Immigration Appeals (BIA), but his appeal was dismissed on March 17, 1981.

Respondent thereupon filed a petition for review in the Ninth Circuit Court of Appeals (No. 81-7236). The petition for review was dismissed on April 20, 1984 because the respondent's counsel had informed the court that he was unable to locate respondent (A.R. 137-138).[1]

On June 18, 1984, the Immigration and Naturalization Service (INS) issued a notice to respondent to surrender for deportation on July 11, 1984. This was the first time respondent learned that his petition for review had been dismissed.[2]

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[1] The government has maintained throughout these proceedings that respondent was negligent in pursuing this petition for review. Respondent claims that it was not his fault, but rather his attorney's, that the petition was dismissed. At the time of his deportation hearing, respondent was represented by Douglas P. Haffer and his associate, Wayne Caldwell. Mr. Caldwell represented respondent at his deportation hearing (A.R. 168), but Mr. Haffer filed the notice of appeal (A.R. 165) and prepared the brief on appeal (A.R. 159). While the petition for review was pending at the Ninth Circuit, Mr. Haffer quit his law practice and moved to Washington, D.C. He left all his cases with Wayne Caldwell (A.R. 37). In 1982, Mr. Haffer returned to San Francisco and resumed his law practice. He wrote to respondent at respondent's address, 55 Eastmoor Avenue #5, Daly City, CA 94105 (A.R. 57). Apparently, Mr. Haffer gave up his practice again sometime in 1983. On January 30, 1984, the Ninth Circuit requested respondent to file a status report stating, inter alia, respondent's current address. Mr. Caldwell reported to the court that he could not locate respondent, but his only effort consisted of writing to respondent at 2582-38th Avenue, San Francisco, California (A.R. 58), an address at which respondent last resided in August of 1980 (A.R. 34). Respondent's correct mailing address was the Eastmoor Avenue address (A.R. 34).

[2] The INS located respondent at the Eastmoor Avenue address (A.R. 61).

On July 9, 1984, respondent married Lauralee (Laurie) Eulalie Thoms,[3] an American citizen, whom he had met in August of 1983 and with whom he had been living since December 1983. Respondent did not report for deportation. On October 4, 1984, he and Laurie appeared at the Immigration Service to file her relative visa petition on his behalf and his application for permanent resident status. Respondent was taken into custody.[4]

Respondent thereupon submitted motions to reopen the deportation proceedings to apply for adjustment of status (8 U.S.C. § 1255) and suspension of deportation (8 U.S.C. § 1254). His adjustment of status application was submitted in conjunction with his wife's immediate relative visa petition on his behalf. In support of his motions, he submitted affidavits and other evidentiary material to demonstrate that his marriage was bona fide, that it was not his fault, but rather his attorney's, that his petition for review

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[3] Petitioner insists on spelling respondent's wife's name as "Thomas" when it is in fact "Thoms". (See Petition for Writ of Cert. at 3-5 for incorrect spelling and the copy of the birth certificate of Lauralee Eulalie Thoms at A.R. 134 for correct spelling.) In fact, petitioner corrects the Ninth Circuit's "misspelling" of the name (Pet. App. 2a). Respondent has maintained throughout these proceedings that the government has distorted the facts of his case. The misspelling of his wife's name is but one example.

[4] The District Director denied a stay of deportation request. Deportation was stayed when the Ninth Circuit reinstated the previously dismissed petition for review. The petition was reinstated after an oral emergency motion with the understanding that respondent was eligible for relief from deportation and would be filing a motion to reopen the proceedings to apply for such relief (Pet. App. 18a). Respondent was released from custody on October 10, 1984 after posting a $25,000 bond. The petition for review was dismissed, upon respondent's motion, on March 6, 1985 after the BIA denied the motion to reopen and the second petition for review was filed (Pet. App. 16a).

was dismissed and that he and his wife would suffer extreme hardship were he to be deported to Iran because of the current conditions in Iran and because it would be practically difficult for him to apply for an immigrant visa abroad (Pet. App. 2a).

The BIA denied respondent's motions on February 8, 1985. The BIA denied the motion to reopen for adjustment of status in the exercise of discretion, relying on three negative factors (as described by the BIA); 1) that respondent married barely two days before he was required to leave the country; 2) that he did not adequately explain his failure to surrender for deportation; and 3) that he was negligent in failing to prosecute his petition for review. The BIA recited the same negative factors in denying his motion to reopen to apply for suspension of deportation as a matter of discretion. In addition, the BIA found that respondent did not present a prima facie case of extreme hardship, because neither respondent nor his wife would suffer permanent hardship because respondent had the ready means to immigrate through his marriage (Pet. App. 4a).

The Court of Appeals reversed the BIA's decision and remanded for further consideration (Pet. App. 1a-7a). It relied on its own previous decisions which had held that in denying a motion to reopen, the BIA must weigh both favorable and unfavorable factors, must state its reasons when weighing equities and denying relief, and in weighing equities "cannot act upon assumptions unsupported in the record and contradicted by affidavits that are not inherently unbelievable" (Pet. App. 4a-5a). The court concluded that the BIA had acted arbitrarily and irrationally because each of the factors upon which the Board relied "were based upon mere assumptions which were contra-

dicted by the [respondent's] evidence" (Pet. App. 5a). Specifically, the court found that the BIA's conclusion that respondent had been negligent in not pursuing his previous petition for review was contradicted by respondent's own affidavit (Pet. App. 6a). The court found that it was an abuse of discretion for the BIA to ignore the evidence submitted concerning the bona fides of the marriage and instead rely on the last minute timing of the marriage to discount the marriage as a significant equity (Pet. App. 5a-6a). And, the court found that the BIA's assumption, in rejecting respondent's extreme hardship claim, that he could readily immigrate was not supported by evidence in the record indicating the difficulties he would encounter due to required military service and lack of an American Consulate in Iran (Pet. App. 6a-7a).

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SUMMARY OF ARGUMENT REASONS FOR DENYING CERTIORARI

A careful review of all relevant Court of Appeals decisions reveals that there is no conflict among the circuits concerning the proper standard to be applied in reviewing BIA discretionary denials of motions to reopen. Neither does the Ninth Circuit's approach to reviewing such BIA discretionary denials conflict with Supreme Court precedent.

The case is not a proper vehicle for Supreme Court consideration of the role of the Court of Appeals in reviewing BIA discretionary denials of motions to reopen because of intervening legislation which will affect future motions to reopen and which personally affects respondent's case.

The Immigration Reform and Control Act of 1986 (Pub. L. No. 99-603 (Nov. 6, 1986)) provides respondent a remedy from deportation which does not rely on the Board's discretion to reopen the proceedings in his case. By the time this case is briefed and argued, if accepted by the Court, respondent already will have filed his application for legalization and is likely to have already achieved his relief from deportation. The Immigration Marriage Fraud Amendments of 1986 (Pub. L. No. 99-639 (Nov. 10, 1986)) will virtually eliminate all motions to reopen for adjustment of status based on eligibility for permanent residence through marriage.

This case is not ripe for review because it has been remanded to the BIA. Moreover, it is not a proper vehicle for Supreme Court consideration because of the significant factual issues which still remain to be resolved on remand.

ARGUMENT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE PROPER STANDARD OF REVIEW TO BE APPLIED IN REVIEWING DISCRETIONARY DETERMINATIONS BY THE BIA. NOR DOES THE STANDARD USED BY THE NINTH CIRCUIT IN THIS CASE CONFLICT WITH SUPREME COURT PRECEDENT.

1. Conflict Among the Circuits

A denial by the BIA of a motion to reopen will be reviewed on a petition for review utilizing an abuse of discretion standard. *INS v. Rios-Pineda,* 471 U.S. 444 (1985),

INS v. Phinpathya, 464 U.S. 183 (1984). The circuit courts have adopted various language formulations in articulating the abuse of discretion standard. The two most prevalent formulations are taken from the Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law", and from *Wong Wing Hang v. INS,* 360 F.2d 715, 719 (2nd Cir. 1966), "a decision made without rational explanation, which inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination against a particular race or group". The circuit courts have never indicated any conflict between these two standards.[5] Several courts have utilized both standards in their decisions, in a complementary fashion. See, *e.g. Sang Seup Shin v. INS,* 750 F.2d 122, 124 (D.C. Cir. 1984) ("[A] tribunal may not act arbitrarily or irrationally. . . . It must explain departure from established policies".); *Balani v. INS,* 669 F.2d 1157, 1160-61 (6th Cir. 1982); *Williams v. INS,* 773 F.2d 8, 9 (1st Cir. 1985).

Petitioner contends that the Ninth Circuit applies a much more searching standard of review—that the Ninth Circuit reviews BIA decisions de novo, not for an abuse of discretion, and applies a strict articulation test (Pet. for Writ of Cert. 15). However, it is apparent from the decision in this case that the Ninth Circuit, like other circuits, will only reverse a discretionary determination if it is "arbitrary, irrational or contrary to law" (Pet. App. 4a). Why then does petitioner contend that the Ninth Circuit reviews

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[5] This Court found no conflict between these two standards in *Citizens to Preserve Overton Park, Inc., et al. v. Volpe, Secretary of Transportation, et al.,* 401 U.S. 402, 416 (1970).

decisions de novo and applies a strict articulation test? Petitioner bases his argument on those Ninth Circuit decisions which reviewed BIA decisions to determine whether they fairly considered the evidence and claims put forth by an alien from a *procedural* standpoint. Petitioner argues that these decisions conflict with decisions from other circuits, specifically the First, Second, Sixth and Seventh Circuits (Pet. for Writ of Cert. 16). But, a careful review of decisions from these circuits and others reveals that there is, in fact, no conflict among the circuits.

The Ninth Circuit requires that the BIA weigh both positive and negative factors when considering a motion to reopen, *De La Luz v. INS*, 713 F.2d 545, 546 (9th Cir. 1983) and requires that the BIA demonstrate in its decision that the equities have been weighed and state its reasons for denying relief. *Prapavat v. INS*, 662 F.2d 561, 562 (9th Cir. 1981). Further, the Ninth Circuit requires that the BIA consider all evidence submitted by an alien in support of a motion to reopen, *Mattis v. INS*, 774 F.2d 965, 968-69 (9th Cir. 1985), and must accept as true uncontradicted statements in affidavits unless inherently unbelievable, *Reyes v. INS*, 673 F.2d 1087, 1090 (9th Cir. 1982). Finally, the Ninth Circuit has found an abuse of discretion when the BIA acts upon assumptions not in the record and misapplies the principles upon which it purports to act. *Gonzalez-Batoon v. INS*, 791 F.2d 681, 686 (9th Cir. 1986) (en banc).[6]

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[6] For instance, in *Mattis v. INS*, 774 F.2d 965 (9th Cir. 1985), the court reversed and remanded where the BIA denied a motion to reopen because of the alien's last minute marriage despite the substantial evidence submitted demonstrating the bona fides of the marriage. In *Gonzalez-Batoon v. INS*, 791 F.2d 681 (9th Cir. 1986), the court found an abuse of discretion when the BIA "misstated the record and accused the [alien] of overstaying a grant of voluntary departure when in fact she had not done so" (Pet. App. 5a).

Other circuits' decisions are not in conflict with the Ninth Circuit's aproach. In fact, several circuits specifically have adopted the same approach and have cited the Ninth Circuit's decisions. The Eighth, Tenth and District of Columbia Circuits have held, relying on Ninth Circuit decisions such as *Prapavat, Reyes,* and *Santana-Figueroa v. INS,* 644 F.2d 1354 (9th Cir. 1981), that the BIA must consider all factors, articulate reasons for denial and accept statements in affidavits as true unless inherently unbelievable and that the BIA cannot deny motions to reopen for reasons contradicted by evidence in the record. *See, Carrete-Michel v. INS,* 749 F.2d 490 (8th Cir. 1984), *Motamedi v. INS,* 713 F.2d 575 (10th Cir. 1983), *Sang Seup Shin,* supra, and *Haftlang v. INS.* 790 F.2d 140 (D.C. Cir. 1986).

The Third and Fifth Circuits have developed a similar approach. In *Ravancho v. INS,* 658 F.2d 169 (3rd Cir. 1981), the Third Circuit found that the procedure utilized by the BIA in considering a motion to reopen may amount to an abuse of discretion. The court then concluded that there was an abuse of discretion when the record contained uncontradicted evidence of eligibility for deportation relief and the BIA gave no reasoned evaluation of its reasons for denial. Similarly, in *Zamora-Garcia v. INS,* 737 F.2d 488, 490 (5th Cir. 1984), the Fifth Circuit held that a reviewing court should properly review BIA "determinations 'procedurally' to ensure that the complaining alien has received full and fair consideration of all circumstances that give rise to his or her claims".[7] The court then re-

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[7] The court relied on the Ninth Circuit cases, *Prapavat v. INS,* 662 F.2d 561 (9th Cir. 1981) and *Santana-Figueroa v. INS,* 644 F.2d 1354 (9th Cir. 1981) and on *Ravancho v. INS,* 658 F.2d 169 (3rd Cir. 1981).

versed and remanded for the BIA to consider certain factors not considered in their original decision. See also, *Ramos v. INS,* 695 F.2d 181 (5th Cir. 1983).[8]

Decisions by the First, Sixth and Seventh Circuits do seem to indicate an approach differing from the Ninth Circuit's at first glance, but upon more careful consideration, the decisions reveal an approach which is not significantly in conflict with the other circuits. For instance, in *Williams v. INS,* supra, and *LeBlanc v. INS,* 715 F.2d 685 (1st Cir. 1983), the First Circuit found that its scope of review of BIA discretionary decisions was quite narrow, and it applied the standard taken from *Wong Wing Hang.* However, in each case, there were no factual disputes in the record, no indication that the BIA failed to consider relevant factors and the BIA's decision was grounded on clear negative factors of the type present in *Rios-Pineda,* (e.g. dilatory tactics and repeated immigration violations).[9] *See also, Balani v. INS,* 669 F.2d 1157 (6th Cir. 1982) (The aliens pre-

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[8] Other Fifth Circuit cases seem to differ in approach, finding that a court's review of BIA decisions is extremely limited and concluding that BIA decisions would be upheld even if the BIA did not indicate specifically that it had considered each and every factor. *See Osuchukwu v. INS,* 744 F.2d 1136 (5th Cir. 1984), *Luciano-Vincente v. INS,* 786 F.2d 706 (5th Cir. 1986) and *Yahkpua v. INS,* 770 F.2d 1317 (5th Cir. 1986). However, in none of these cases was there a dispute concerning the facts, and the court concluded in each case that the BIA decision adequately indicated that the BIA had fairly considered all factors, the alien's claims and the evidence submitted.

[9] In an earlier decision, *Luna v. INS,* 709 F.2d 126 (1st Cir. 1983), the First Circuit found that the BIA abused its discretion in relying on a negative fact which was in dispute. The court held, relying on the Ninth Circuit's *Reyes* decision, that a factual dispute should not be resolved against an alien in the motion to reopen context without a hearing.

sented neither a prima facie case of extreme hardship for suspension of deportation nor new material facts justifying reopening.) and *Dallo v. INS*, 765 F.2d 581 (6th Cir. 1986) (The alien presented no equities at all, had engaged in a fraudulent marriage and had pursued dilatory tactics.)

Petitioner places great reliance on *Achacoso-Sanchez v. INS*, 779 F.2d 1260 (7th Cir. 1985) (Pet. Writ for Cert. 16, 20), wherein the Seventh Circuit found that judicial review of BIA determinations was severely restrictive and applied the *Wong Wing Hang* standard. Nevertheless, the court acknowledged that the BIA does abuse its discretion when "it acts for a forbidden reason or for a reason that the court *can* determine is erroneous". *Achacoso-Sanchez v. INS*, 779 F.2d at 1265. Moreover, the court stated clearly that "the Board abuses its discretion when it acts on a supposition that is not true." *Id.* at 1266.[10] Therefore, it would appear that the Seventh Circuit would not differ in its approach from the Ninth Circuit if presented with a case where the BIA distorted the evidence, ignored important evidence or based its discretionary determinations on suppositions not supported by the record.

In sum, all circuits apply a similar standard to review discretionary determinations by the BIA, and every circuit,

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[10] The court was troubled by the BIA's assertion that the alien would only have a short separation from her family due to her eligibility for an immigrant visa; the court questioned whether that assertion was factually true. *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1266 (7th Cir. 1985). The court did not find an abuse of discretion because the alien did not submit any evidence that the BIA's supposition was in error, *Id.* at 1267, but presumably had the alien's evidence contradicted the BIA's suppositions, as in respondent's case, the court would have reversed.

which has considered a challenge to the fairness of the procedure whereby the BIA has evaluated the claims and evidence submitted on motions to reopen, has concluded, consistent with the Ninth Circuit's decisions, that the BIA must fairly consider all factors, articulate a basis for its denial and fairly treat the evidence submitted. There is no conflict among the circuits on this point.

2. Conflict With Supreme Court Precedent

The Ninth Circuit's decision in this case is in no way in conflict with this Court's decisions in *Jong Ha Wang,* 450 U.S. 139 (1981) or *INS v. Rios-Pineda,* supra. In *Wang,* this Court reversed a Ninth Circuit decision which had determined that the alien had presented a prima facie case of extreme hardship for suspension of deportation and therefore was entitled to have his case reopened. The Court reversed on the grounds that the alien had not complied with the regulatory requirement to submit affidavits or other evidentiary material and that the Ninth Circuit had impermissibily interfered with the BIA's broad discretion to construe the extreme hardship requirement contained in 8 U.S.C. § 1254.

In *Rios-Pineda,* this Court reversed an Eighth Circuit decision which had held that reopening for suspension relief was mandated when a prima facie case of extreme hardship had been demonstrated. This Court found that the BIA could deny a motion to reopen as a matter of discretion when it determined that the underlying relief, i.e. suspension of deportation, would be denied as a matter of discretion. The Court further concluded that the BIA's decision did not "involve the unreasoned or arbitrary exercise of discretion" and that "the BIA's explanation of its decision was grounded in legitimate concerns

about the administration of the immigration laws''. *Id.* at 451-52. In the particular case, the Court upheld the BIA's discretionary denial based on the aliens' use of dilatory tactics to gain the seven years residence required for suspension and on their repeated, flagrant violations of the immigration laws.

In neither *Rios-Pineda* nor *Wang* did this Court indicate that the BIA's broad discretion in evaluating motions to reopen extended to basing its decisions on evidence contradicted in the record or to making discretionary determinations without considering all of the evidence or all of the factors relevant to the alien's claim. Therefore, neither the Ninth Circuit's decision in this case nor in other cases cited by petitioner conflict with this Court's decisions in *Wang* and *Rios-Pineda.* Moreover, the Ninth Circuit has followed this Court's lead in *Rios-Pineda* in upholding discretionary denials where there has been flagrant violations of the immigration laws, *Ahwazi v. INS,* 751 F.2d 1120 (9th Cir. 1981) and *Sangabi v. INS,* 763 F.2d 374 (9th Cir. 1985), and in requiring that BIA discretionary determinations be grounded in legitimate concerns about the administration of the immigration laws, *Gonzalez-Batoon v. INS,* 791 F.2d at 686 and *Aviles-Torres v. INS,* 790 F.2d 1433, 1437 (9th Cir. 1986).

II. THIS CASE IS NOT A PROPER VEHICLE TO RAISE THE ISSUES PRESENTED BECAUSE OF INTERVENING LEGISLATIVE DEVELOPMENTS.

1. Immigration Reform and Control Act of 1986.

Since respondent's case was decided by the Ninth Circuit, he has become eligible for another form of relief from deportation, namely, legalization, under the Immigration

Reform and Control Act of 1986 (IRCA). Pursuant to Section 201 of IRCA, codified as 8 U.S.C. § 1255a, respondent is eligible to adjust his status to that of a temporary resident, and after eighteen months in that status, he will be eligible to apply for adjustment to lawful permanent resident status. He will be able to make his application for legalization when the application period begins in May, 1987. He is required to make his application during the first 30 days of the application period. 8 U.S.C. § 1255a(a)(1). Until such time as his application is filed and while his application is pending, he cannot be deported under a stay of deportation provided by IRCA, and once he files an application, he will be granted work authorization. 8 U.S.C. § 1255a(e).

The eligibility requirements—illegal residence in the U.S. since at least December 31, 1981, admissibility under 8 U.S.C. § 1182, no felony conviction or convictions for three misdemeanors and others listed in 8 U.S.C. § 1255a (a)(4)—can all be met by respondent as is evident from the record. Moreover, determinations made under this new law are not subject to INS discretion; nor is a motion to reopen required to allow consideration of the temporary residence application. Therefore, it is a foregone conclusion that by the time this Court considers this case, if accepted for consideration, respondent will have already filed his application for temporary residence, obtained work authorization and escaped deportation. Respondent will have essentially obtained the relief he sought through his motion to reopen—suspension of deportation and eligibility for permanent resident status. For the Court to decide the issues presented for review in the context of this case would be a hollow exercise for the eventual outcome

would have no effect on the ultimate disposition of respondent's case.

2. The Immigration Marriage Fraud Amendments of 1986

The Immigration Marriage Fraud Amendments of 1986 (Marriage Fraud Amendments) have drastically altered the procedures for applying for adjustment of status based on marriage in the context of deportation proceedings. Section 5 of the new law provides that an alien who marries while in deportation proceedings is barred from adjustment of status based on the marriage and requires that a relative visa petition on his/her behalf may not be approved until the alien has resided outside the United States for a period of two years after the date of the marriage. If this new law had been in effect when respondent married his wife, he would not have been eligible to file a motion to reopen for adjustment of status. Section 5 virtually eliminates all motions to reopen for adjustment of status based on marriage since motions to reopen must be based on new facts or evidence not available at the time of the original deportation hearing. Usually, when motions to reopen are filed for adjustment of status based on marriage, the new fact is the marriage itself. But, under the new law, if the alien marries after deportation proceedings have commenced, he will be ineligible for adjustment of status and must depart the United States for two years before immigrating.[11]

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[11] One discreet fact pattern which would allow motions to reopen for adjustment of status would be where the alien mar-

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Section 5 of the Marriage Fraud Amendments should also affect how the BIA looks at claims for suspension of deportation based on extreme hardship to a citizen spouse acquired during deportation proceedings. The forced separation of two years before reimmigration could be considered to indicate substantial hardship, in and of itself. In respondent's case for instance, the Ninth Circuit found that respondent's claim that he would be forced to return to Iran for at least two years was important to his claim that he and his wife would suffer extreme hardship (Pet. App. 6a-7a). On the other hand, the BIA might give less weight to such hardship because Congress has specifically indicated its suspicion of marriages entered into after deportation proceedings have commenced and to grant suspension would interfere with the deterrence goal of the adjustment prohibition.

Respondent's case directly involves how the BIA evaluates motions to reopen for adjustment of status based on marriage and claims for suspension of deportation based on hardship to a U.S. citizen spouse acquired during deportation proceedings. Since the rules of the game have completely changed since the BIA and Ninth Circuit de-

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ried a lawful permanent resident before deportation proceedings commenced and was ineligible to adjust at the hearing because of quota limitations or 8 U.S.C. § 1255 ineligibility (out of status, working without authorization). If subsequent to the hearing his wife becomes a United States citizen and he would become eligible for adjustment, he could file a motion to reopen for adjustment based on the new fact of his wife's citizenship. He would not be ineligible for adjustment under the new law because his marriage occurred prior to the initiation of deportation proceedings. *See Sang Seup Shin v. INS*, 750 F.2d 122 (D.C. Cir. 1984).

cisions, this case is not a proper vehicle to decide how the BIA should make discretionary determinations on motions to reopen. Discretionary determinations turn on the individual facts of each case. "Judicial discretion is governed by the situation and circumstances affecting each individual case." *NLRB v. Guernsey-Muskingum Electric Co-op, Inc.*, 285 F.2d 8, 11 (6th Cir. 1960), quoted in *Balani v. INS*, 669 F.2d at 1161. A decision made by this Court in this case would have little practical applicability to other subsequent cases because of the significant changes in the law. It would be better for this Court to wait and let the BIA and circuits have a chance to develop standards and approaches for evaluation of motions to reopen arising after the changes in the law.

III. THIS CASE IS NOT YET RIPE FOR REVIEW NOR IS IT A PROPER VEHICLE TO RAISE THE QUESTIONS PRESENTED BECAUSE OF THE FACTUAL DISPUTES LEFT UNRESOLVED.

The Court below ordered a remand to the BIA to allow the BIA to consider the evidence it failed to consider in making its original determination. The propriety of deferring review by this Court until after remand has been recognized by this Court. In *Brotherhood of Locomotive Firemen and Enginemen, et al. v. Bangor & Aroostoor Railroad Co., et al.*, 389 U.S. 327, 328 (1967), this Court determined that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court."

The question the petitioner presents for review—whether the BIA's discretionary decision to deny reopening must be affirmed if plausible and not arbitrary—cannot be addressed if the BIA's so-called plausible explana-

tion does not take into consideration all of the facts. That specific legal issue would be better addressed after the BIA had an opportunity to provide an explanation for its decision that took into consideration all of the available facts.

Further, this case involves a genuine dispute between the parties as to factual matters. The BIA never attempted to resolve the factual disputes—whether respondent was at fault for not pursuing his appeal and whether respondent could readily reimmigrate—because the BIA completely ignored the evidence presented and statements made by respondent. This Court's attention to this case at this point would be premature because there are important factual issues to be resolved by the BIA on remand.

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CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 19, 1987